Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

JOSLYN MANUFACTURING COMPANY,

Petitioner,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit violate the *Erie* doctrine by failing to apply Louisiana law? Did the court abuse its discretion by refusing to certify the question before it knowingly applied a rule which Louisiana courts do not?

In 1988, the Fifth Circuit predicted the Louisiana Supreme Court would hold that, when a liability insurance policy requires the insured to give immediate notice of a claim as a "condition precedent" to coverage, the insurer can avoid coverage even though it suffered no prejudice from the delay in notice. *MGIC, infra.*

The Fifth Circuit admitted in this case that the Louisiana Supreme Court had rejected *MGIC's* "condition precedent" approach in *Jackson, infra,* a case the *MGIC* court failed to cite or discuss. Louisiana's high court held that whether the insurer suffered prejudice was an important factor in all delayed notice cases. Louisiana intermediate appellate decisions following *Jackson* have held that an insurer must demonstrate prejudice to avoid coverage on late notice grounds.

But the Fifth Circuit held it was bound by *MGIC,* and denied petitioner's motion to certify. The application of the Fifth Circuit's "condition precedent" rule resulted in the forfeiture of petitioner's liability insurance for a $13 million environmental clean-up on account of a delay in notice which the insurance company admits caused it no harm.

The Louisiana Department of Insurance filed an *amicus* brief in support of petitioner's suggestion for rehearing *en banc.* It stated that the Fifth Circuit had failed "to follow the law and well-established jurisprudence of Louisiana. . ." and that the "Department of Insurance is concerned that foreign insurers will

seek to use the federal courts as a convenient forum to defeat claims on hypertechnical grounds which would not be cognizable in state courts. . ." The suggestion for rehearing was denied.

The simplest method of assuring that *Erie* is complied with, and that Louisiana law is correctly applied, is to certify the question to the Louisiana Supreme Court.

Petitioner respectfully requests the Court to grant *certiorari* and vacate and remand for reconsideration of the motion to certify. *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).

LIST OF ALL PARTIES TO THE PROCEEDINGS

Joslyn Manufacturing Company

Liberty Mutual Insurance Company

RULE 29.1 LISTING

Petitioner Joslyn Manufacturing Company is a wholly owned subsidiary of Joslyn Corporation, a publicly held and traded corporation with outstanding securities in the hands of the public. Affiliates include other subsidiaries of petitioner's parent corporation, being Joslyn Clark Controls, Inc., Joslyn Canada Inc., Joslyn Hi-Voltage Corporation, Joslyn Electronic Systems Corporation, Joslyn Power Products Corporation, Joslyn Research and Development Corporation, ADK Pressure Equipment Corporation, Sunbank Family of Companies, Inc., Sunbank Electronics, Inc., Air-Dry Corporation of America, Joslyn Foreign Sales Corporation, Joslyn Jennings Corporation, Jennings Land Co., Joslyn Foundation and Joslyn Sierra Corp.

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No.

In The

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October Term, 1994

JOSLYN MANUFACTURING COMPANY,

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vs.

LIBERTY MUTUAL INSURANCE COMPANY,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Joslyn Manufacturing Company v. Liberty Mutual Insurance Company, 30 F.3d 630 (5th Cir. 1994), reproduced herein as Appendix A; and *Joslyn Manufacturing Company v. Liberty Mutual Insurance Company,* 836 F. Supp. 1273 (W.D. La. 1993), reproduced herein as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on September 2, 1994. A suggestion for rehearing *en banc* filed by petitioner was denied on September 30, 1994, and the order is reproduced herein as Appendix C. This Court has jurisdiction to issue the requested writ of certiorari under 28 U.S.C. § 1254(1).

Subject matter jurisdiction in the district court was pursuant to 28 U.S.C. § 1332. Petitioner Joslyn is a Delaware corporation with its principal place of business in Chicago, Illinois. Respondent Liberty is a Massachusetts corporation having its principal place of business in Boston, Massachusetts. The amount in controversy exceeds $50,000 exclusive of interest and costs.

CONSTITUTIONAL PROVISION INVOLVED

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X. *See Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938).

STATEMENT OF THE CASE

A. Factual Background

This is an action for declaratory judgment and damages. Petitioner purchased comprehensive general liability insurance coverage from Liberty Mutual Insurance Company ("Liberty")

for its wood treatment plant in Bossier City, Louisiana from the plant's purchase in 1950 until its sale in 1969. Liberty refused to defend or indemnify petitioner against Louisiana Department of Environmental Quality ("DEQ") orders directing petitioner and others to investigate and remediate environmental damage at the site. Petitioner seeks reimbursement of past defense costs, indemnity of its past clean-up costs and a declaration that Liberty must pay its future defense and clean-up costs.

On August 2, 1986, the DEQ issued a compliance order "finding that Joslyn [petitioner] and twelve other parties were subject to liability for clean-up and remedial costs. . ." App. A, 2a-3a. However, the order merely asked the parties "to submit a letter to the DEQ stating whether [they] would voluntarily investigate and remediate the contamination at the property." *Id.*, 3a. The order was "stayed because of requests for hearing." *Id.*

Petitioner sent the stayed August 2, 1986 order to Liberty on May 19, 1987. On June 23, 1987, petitioner wrote Liberty that it expected the DEQ to enter another order; that it intended to comply because it would be less expensive than having a government agency clean up the site and sue for damages; but that petitioner would not comply if Liberty so advised. Liberty acknowledged receipt of the letter, but did nothing.

On December 17, 1987, the DEQ issued an amended order. It was identical to the August 2, 1986 order, except that it deleted the language requesting a letter and instead ordered the work to begin. It was served on petitioner on December 22, 1987. Petitioner sent it to Liberty nine days later. Liberty did not defend petitioner.

On March 30, 1989, Liberty wrote petitioner that it was denying coverage. It did so solely on grounds other than notice.

Petitioner alone has investigated and remediated the site. It has spent over $13 million to date. Its investigation of the environmental damage began over a year after Liberty first received notice. The clean-up itself, which has accounted for over $12 million, began in February 1992, three years *after* Liberty denied coverage.

B. Proceedings Below

Petitioner and Liberty conducted a jury trial on the two issues which the parties agreed had prevented settlement: Whether the claim was excluded from coverage because (1) petitioner "expected or intended" to cause the contamination damage or (2) because the damage was limited to the property petitioner had owned (and was therefore excluded from coverage under its liability policies). The jury found in petitioner's favor, *i.e.*, that it did not expect or intend to cause the damage and that its clean-up protected Louisiana's groundwater. App. B, 13a.

The parties submitted the remaining issues to the district court. The court held that, while the policies obligated Liberty to defend "suits," not "claims," they did require petitioner to give immediate notice of claims as a "condition precedent" to coverage. It found that the stayed August 2, 1986 order was a claim and that, under *MGIC*, petitioner's failure to give immediate notice of that order forfeited its insurance coverage even though the delay in notice caused no prejudice to Liberty. App. B, 20a.

On appeal, petitioner argued that the district court should be reversed because the Louisiana Supreme Court had rejected *MGIC's* "condition precedent" rule in *Jackson* and because Louisiana courts require the insurer to demonstrate prejudice to avoid coverage on late notice grounds. Alternatively, it argued that the Fifth Circuit was obligated to certify the question before it knowingly applied a rule which Louisiana courts do not.

The Fifth Circuit acknowledged that its *MGIC* decision was inconsistent with *Jackson*. App. A, 7a. But it affirmed, finding it was "bound by our precedent in *MGIC*." *Id.*, 10a. The court denied petitioner's motion to certify. *Id.*, 11a.

Petitioner filed a suggestion for rehearing *en banc*. The Louisiana Department of Insurance, the Louisiana Chemical Association, the Louisiana Shipbuilding and Repair Association, Avondale Industries, Inc. and Citizens For A Cleaner Environment filed motions for leave to appear as *amici* in support of petitioner's request for reversal or certification. The Fifth Circuit denied rehearing. App. C, 29a.

REASONS FOR GRANTING THE WRIT

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court held that federal courts are to apply the law of the state, except in matters governed by the Constitution or by acts of Congress. *Id.*, 78. To do otherwise was deemed an invasion of "rights which in our opinion are reserved by the Constitution to the several states." *Id.*, 80. The ultimate goal is to achieve the same result regardless of whether the case is brought in state or in federal court pursuant to diversity jurisdiction. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945).

The outcome of this case was improperly determined by the fact that it was decided in federal court. First, the Fifth Circuit applied its own rule even though it has been rejected by the Louisiana Supreme Court and is not applied by Louisiana state courts. Second, the court refused to certify the question so that the Louisiana Supreme Court could review the matter before the rejected rule was applied in this case. The Court should grant certiorari. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("The rules indicate that the Court will be persuaded to grant certiorari where a Circuit Court of Appeals 'has decided an

important question of local law in a way probably in conflict with applicable local decisions.' ").

I.

THE FIFTH CIRCUIT VIOLATED *ERIE* BY FAILING TO APPLY LOUISIANA LAW IN THIS DIVERSITY CASE.

A. The Fifth Circuit's Prediction Of Louisiana Law In *MGIC*.

The district court held that the "harsh result" in this case was required by *MGIC Indem. Corp. v. Central Bank of Monroe, La.*, 838 F.2d 1382 (5th Cir. 1988). The Fifth Circuit erred in its interpretation of Louisiana law in *MGIC*, and it is that error which it protected from review by denying petitioner's motion to certify.

In *MGIC*, United was a Central Bank customer. A Central Bank officer mistakenly approved a potentially unlimited letter of credit in favor of Philadelphia Gear to cover United's purchases. Central Bank discovered the problem after United had incurred a $4.5 million debt. United defaulted. Philadelphia Gear sued Central Bank when it failed to honor drafts on the letter of credit. Philadelphia Gear won, and Central Bank appealed.

Central Bank had director and officer's liability insurance with MGIC. It first gave notice to MGIC while its appeal of Philadelphia Gear's judgment was pending. MGIC filed a declaratory judgment action claiming Central Bank's failure to give timely notice relieved it of its coverage obligations. The jury found the insurer had been prejudiced by Central Bank's failure to give timely notice. Central Bank appealed.

The Fifth Circuit found no governing decision of the

Louisiana Supreme Court. The *MGIC* court admitted that the most recent Louisiana intermediate appellate cases held that an insurer must demonstrate prejudice to avoid coverage on late notice grounds. 838 F.2d at 1387. It admitted that it could affirm by finding the insurer had been prejudiced as a matter of law. *Id.*, fn. 2. Instead, the *MGIC* court affirmed by holding that the insurer need not show prejudice to avoid coverage when the policy states that notice is a "condition precedent" to coverage:

> We hold that the language stating that compliance with this provision is a condition precedent to recovery under the policy means exactly what it says, and that if Central failed to comply with this provision by not giving MGIC timely notice of the claim made, then the claim will not be covered under the policy, regardless of whether MGIC can demonstrate prejudice.

Id., 1385-86.

Unlike the insurer in *MGIC*, Liberty could not demonstrate that it was prejudiced by the delayed notice in this case. It argued that this fact was immaterial under *MGIC*. The district court agreed, and the Fifth Circuit affirmed.

B. But The *MGIC* Court Failed To Cite Or Discuss A Louisiana Supreme Court Decision Rejecting The "Condition Precedent" Rule.

In *Jackson v. State Farm Mut. Auto. Ins. Co.*, 23 So. 2d 765 (La. App. 1945), a Louisiana appellate court applied the "condition precedent" rule and held that the insured forfeited coverage on account of a delay in notice which caused no harm to his liability insurer:

> Since the giving of notice is required as a condition precedent to recovery, and since the giving of a notice by the insured some eighty-two days after the accident is not one "as soon as practicable" under the circumstances of this case, the judgment appealed from should be affirmed.

Id., 770.

The Louisiana Supreme Court rejected the "condition precedent" rule. It held that courts should balance the equities and consider whether the insurer was prejudiced by the delay in notice in every case:

> Each case involving delayed notices must stand upon its own facts and circumstances. The Court may consider in balancing the equities, not only the time intervening between the accident and the date of notice to the insured, and whether or not the claim is a direct one by the injured persons, under Act 55 of 1930, but also when the parties first discovered that substantial injury had been done or that a claim would be made; the time when the injured party discovered that insurance existed and knew the identity of the insurer; what prejudice to the insurance company's defense has been caused by the delay; the good faith of the insured and injured party; and the existence of any special circumstances, especially those indicating fraud or collusion.

Jackson, 29 So. 2d 177, 179 (La. 1946). Applying this test, the Louisiana Supreme Court reversed. The court concluded that the

insured had reasonable grounds to delay notice, there was no substantial prejudice to the insurer and no evidence of fraud, collusion or bad faith. *Id.*

Louisiana appellate cases following *Jackson* have held that an insurer must demonstrate prejudice to avoid coverage on late notice grounds.[1] The Louisiana appellate cases from which the Fifth Circuit derived its "condition precedent" rule in *MGIC — Menard* (1966), *Payton* (1966) and *Hallman* (1963), 838 F.2d at 1386 — did not cite *Jackson* and did not reach the Louisiana Supreme Court. The cases cited in footnote 1 were all decided after *Menard, Payton* and *Hallman,* and include cases decided by the Louisiana circuits that decided those three cases.

C. The Fifth Circuit Admits That *MGIC* Is In Conflict With *Jackson.*

The Fifth Circuit admitted in this case that the Louisiana Supreme Court rejected *MGIC's* holding that a non-prejudicial delay in notice breaches a "condition precedent" to coverage:

> Notably, this court's decision in *MGIC* neglected to discuss a Louisiana Supreme Court opinion *disposing of a substantially*

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1. *See, e.g., Davis v. Allstate Ins. Co.,* 272 So.2d 458, 462 (La. App. 1973); *Heimbaugh v. Federal Ins. Co.,* 281 So.2d 839, 845-846 (La. App. 1973); *Kinchen v. Dixie Auto Ins. Co.,* 343 So.2d 263, 265 (La. App. 1977); *Moskau v. Ins. Co. of North America,* 366 So.2d 1004, 1006 (La. App. 1978); *Fakouri v. INA,* 378 So.2d 1083, 1086 (La. App. 1979); *Champion v. Panel ERA Mfring. Co.,* 410 So.2d 1230, 1236 (La. App. 1982); *Gully & Assoc. v. Wausau Ins. Cos.,* 536 So.2d 816, 818 (La. App. 1988); *Rovira v. LaGoDa, Inc.,* 551 So.2d 790, 794 (La. App. 1989); *Barnes v. Lumbermen's Mut. Cas. Co.,* 308 So.2d 326, 328 (La. App. 1975); *Branzaru v. Millers Mut. Ins. Co.,* 252 So.2d 769 (La. App. 1971); *Trosclair v. CNA,* 637 So. 2d 1168 (La. App. 1994). While Louisiana's prejudice requirement once placed it in the minority, it is now the majority rule. *Jones v. Bituminous Cas. Corp.,* 821 S.W.2d 798, 801 (Ky. 1991).

> *similar issue.* The Louisiana Supreme Court has rejected the view that a nonprejudicial delay in notice breaches a "condition precedent" *on similar facts to those presented here.* In *Jackson v. State Farm Mut. Auto. Ins. Co.*, 211 La. 19, 29 So.2d 177 (1946),. . .

App. A, 7a (emphasis supplied).

D. The Fifth Circuit Was Bound By *Jackson*, Not *MGIC*.

The Fifth Circuit should have admitted its error in *MGIC*, applied Louisiana's prejudice requirement and found in petitioner's favor. Instead, it distinguished *Jackson* on grounds not recognized in Louisiana law. This violated *Erie*.

In *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975), the Fifth Circuit refused to apply Texas choice-of-law rules. This Court vacated and remanded:

> A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits. The Court of Appeals in this case should identify and follow the Texas conflicts rule.

423 U.S. at 4-5.

> *1. Jackson Cannot Be Distinguished By The Fifth Circuit's "Sophisticated Business" Concept.*

The Fifth Circuit attempted to distinguish *Jackson* by citing

its contention in *MGIC* that the "equitable rationale [underpinning the prejudice requirement] does not apply so strongly where both parties are sophisticated businesses. . ." App. A, 8a. But no Louisiana state court has applied this exception. The Fifth Circuit admitted as much in *MGIC*. 838 F.2d at 1387.

The Louisiana Supreme Court held in *Jackson* that the equities should be balanced in every case, not just those involving individual (as opposed to business) insureds. 29 So.2d at 179. In Louisiana, the critical factor is whether the delay in notice prejudiced the insurance company's ability to protect itself, not the status of the insured. Judge Tate, later a Justice of the Louisiana Supreme Court, explained in *Miller v. Marcantel,* 221 So.2d 557, 559 (La. App. 1969):

> The function of the notice requirements is simply to prevent the insurer from being prejudiced, not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract to assure the insured and the general public that liability claims will be paid up to the policy limits for which premiums were collected. Therefore, unless the insurer is actually prejudiced by the insured's failure to give notice immediately, the insurer cannot defeat its liability under the policy because of the non-prejudicial failure of its insured to give immediate notice of an accident or claim as stipulated by a policy provision.

2. *Jackson Cannot Be Distinguished Because It Involved A Direct Action Plaintiff.*

The Fifth Circuit also justified its failure to apply *Jackson's* prejudice requirement on the ground that the claimant in *Jackson* was an injured party who sued the defendant's insurer under Louisiana's direct action statute, and the claimant in this case is the insured itself. App. A, 8a. But *Jackson* held that the equities should be balanced in every case and that "whether or not the claim is a direct one. . ." was only one factor to be considered. 29 So.2d at 179. Louisiana courts require prejudice in all cases. As stated in *Miller, supra:*

> The *West* decision [of the Louisiana Supreme Court] primarily involved the liability of an insurer directly to the injured person under the direct-action statute. However, this same test of prejudice or fraud is applied to determine whether delayed notice may exculpate an insurer from liability to its own insured also.

221 So.2d at 560. In fact, the insured was a claimant in *Miller* and every Louisiana appellate case cited in footnote 1, *supra.*

3. *Jackson Cannot Be Distinguished By Counting Days.*

Finally, the Fifth Circuit attempted to distinguish this case from *Jackson* by comparing the length of delay in the two cases. App. A, 8a. But Louisiana courts decide late notice cases by determining whether the insurer was prejudiced, not by arbitrarily counting days. "Though notice of an accident comes a substantial amount of time after it occurred, as long as the rights of the insurer are not prejudiced by the delay, coverage still

exists." *Moskau, supra,* 366 So.2d at 1006-7 (insurer lost notice defense because 2 1/2 year delay in notice caused no prejudice).

II.

THE FIFTH CIRCUIT VIOLATED *ERIE* BY DENYING PETITIONER'S MOTION TO CERTIFY.

The Louisiana Supreme Court is the "ultimate expositor" of Louisiana law in our federal system. *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). Rule XII of the Rules of the Supreme Court of Louisiana allowed the Fifth Circuit to certify the question if it concluded there were "no clear controlling precedents in the decisions of the supreme court of this state."[2]

The Fifth Circuit decided the Louisiana Supreme Court's *Jackson* decision was not controlling precedent. App. A, 8a. Instead of certifying the question, the court held it was bound by its *MGIC* decision. This violated *Erie.*

In *Lehman Brothers v. Schein,* 416 U.S. 386 (1974), the Second Circuit had held that Florida law was consistent with the Second Circuit's interpretation of *Diamond,* a decision of New York's highest court. The court denied a motion to certify the question to the Florida Supreme Court.

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2. "When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court before rendering a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This court may, in its discretion, decline to answer the questions certified to it." La. Sup. Ct. R. XII, § 1.

A unanimous Court vacated the judgment and remanded so that the Second Circuit could reconsider its denial of the motion to certify:

> Such a construction of *Diamond*, the Court of Appeals said, would have "the prophylactic effect of providing a disincentive to insider trading." *Id.*, at 823. And so it would. Yet under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a State can make just the opposite her law, providing there is no overriding federal rule which pre-empts state law by reason of federal curbs on trading in the stream of commerce.

Id., 389.

The Court stated:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.

Id., 416 U.S. at 390-91.

In *Lehman Brothers*, the Court found that certification was appropriate because Florida law was unsettled and federal judges in New York were " 'outsiders' lacking common exposure to local law which comes from sitting in the jurisdiction." 416 U.S. at 391.

The need for certification is even clearer here. If *MGIC* is not clearly inconsistent with *Jackson* and its progeny as petitioner claims, there is at least substantial reason to doubt that it is a correct statement of Louisiana law. The Louisiana Supreme Court rejected *MGIC*'s condition precedent approach in *Jackson;* a long line of Louisiana cases have held that an insurer must demonstrate prejudice to avoid coverage on late notice grounds; and no Louisiana court has found that an insurer is excused from this requirement when the insured is a business.

Further, the Fifth Circuit's failure to apply Louisiana's longstanding prejudice requirement may be related to the fact that no judge from Louisiana sat on the panels that decided *MGIC* or this case. Three months after *MGIC* was decided, a Senior Fifth Circuit judge from Louisiana noted:

> Under Louisiana law, the insurer cannot escape liability because of the insured's failure to give notice of loss as soon as practicable; to avoid coverage the insurer must demonstrate prejudice caused by the insured's delay.

Sandefer Oil & Gas, Inc. v. AIG Oil Rig of Texas Inc., 846 F.2d 319, 321 (5th Cir. 1988) (Wisdom, J.). *See also, Elevating Boats, Inc. v. Gulf Coast Marine, Inc.*, 766 F.2d 195, 198 (5th Cir. 1985).

The Fifth Circuit abused its discretion by applying *MGIC* and denying the motion to certify. The court usurped the Louisiana Supreme Court's authority to change Louisiana law. Its decision invites forum-shopping, the very result *Erie* was intended to prevent. The danger is particularly acute here because most insurance companies are not Louisiana citizens and will be able to invoke diversity jurisdiction to take advantage of the Fifth Circuit rule.

The easiest and simplest method of assuring that Louisiana law is correctly applied, and that *Erie* is complied with, is to certify the question to the Louisiana Supreme Court.

CONCLUSION

Petitioner respectfully requests the Court to grant this petition, issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and vacate and remand for reconsideration of petitioner's motion to certify.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, DATED SEPTEMBER 2, 1994

JOSLYN MANUFACTURING COMPANY,

Plaintiff-Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

No. 93-5563.

United States Court of Appeals,
Fifth Circuit.

Sept. 2, 1994.

* * *

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Jack O. Brittain, Sr., Brittain & Sylvester, Natchitoches, LA, Martha J. Koster, Lee H. Glickenhaus, Boston, MA, for appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

Appendix A

REYNALDO G. GARZA, Circuit Judge:

Joslyn Manufacturing Company ("Joslyn") filed this action for declaratory judgment seeking to enforce an insurance policy with Liberty Mutual Insurance Company ("Liberty"). The policy would obligate Liberty to defend and indemnify Joslyn against Louisiana Department of Environmental Quality ("DEQ") Compliance Orders directing Joslyn to investigate and remediate environmental damage at Joslyn's former wood treatment plant in Bossier City, Louisiana. Joslyn seeks reimbursement for its past defense costs, indemnity of its past clean-up costs, and a declaration that Liberty must pay Joslyn's future defense and clean-up costs. For the following reasons, we affirm the district court.

FACTS

Joslyn purchased the Lincoln Creosoting Plant in Bossier City on July 24, 1950, where it treated wood with creosote. It operated the facility until 1969 when it sold the plant to Koppers, Inc. on December 1, 1969. Joslyn has been a Liberty Mutual insured since 1945. From 1962 through 1969 the creosote plant was an insured location under Joslyn's policies with Liberty. Neither party can locate any of the pre-1962 liability policies between Joslyn and Liberty.

In 1985, the DEQ began studying the old Lincoln Creosoting Plant site. On October 14, 1985, a report was issued to the DEQ that found the soil at the site, as well as an extremely high probability of the groundwater, to be contaminated. On December 6, 1985, the DEQ sent Joslyn an information request concerning the site, and Joslyn responded on February 7, 1986. On August 2, 1986, the DEQ issued a compliance order finding

that Joslyn and twelve other parties were subject to liability for clean-up and remedial costs, and ordered the parties to submit an approved clean-up plan for the site. This order was stayed because of requests for a hearing. The August 2, 1986 DEQ Compliance Order was amended on December 17, 1987.

Joslyn first advised Liberty of the DEQ's actions on May 19, 1987, and on June 23, 1987. Liberty denied coverage by letter of March 30, 1989. This suit seeking declaratory judgment ensued.

On July 8, 1993, United States District Judge Tom Stagg issued a Memorandum Ruling, 836 F.Supp. 1273. In it the court found that Liberty had no duty to indemnify Joslyn because Joslyn failed to comply with the "immediate notice" condition precedent by waiting nine months before giving notice of an August 2, 1986 DEQ Compliance Order asking Joslyn to submit a letter to the DEQ stating whether it would voluntarily investigate and remediate the contamination at the property. The court further held that Liberty had no duty to defend Joslyn because the Compliance Order directing Joslyn to investigate and clean up the property was not a "suit." Finally, the court struck the affidavit of Philip Gehrke, Joslyn's Risk Manager from 1947 to 1983, regarding the missing insurance policies for 1950 to 1962. Joslyn has timely appealed.

DISCUSSION

This case is subject to a *de novo* review by this court. *Fritiofson v. Alexander,* 772 F.2d 1225, 1239 (5th Cir.1985). The pertinent portions of the insurance contract provided:

> As respects the insurance afforded by the other terms of this policy the company shall:

> (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent.

The "Conditions" section of the Liberty policies stated:

> NOTICE OF CLAIM OR SUIT If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice summons or other process received by him or his representative.
>
> ACTION AGAINST COMPANY No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.[1]

Appellant Joslyn argues that the trial court erred in ruling that they forfeited their insurance coverage because they failed to

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1. This language is from a 1962 policy issued to Joslyn. Liberty Mutual has stated that the language used in the 1962 policy is similar to the language in the 1963-1969 policies, unless specifically noted. *See* Liberty Mutual's post-trial brief at p. 6, fn. 2. Joslyn has not contested this statement.

immediately notify Liberty of the August 2, 1986 DEQ Compliance Order, as was required by the insurance contract. Joslyn asserts that the August 2, 1986 DEQ order was not a claim or suit which triggers their duty to provide immediate notice to Liberty.[2] Appellant states that the DEQ Compliance Order asked it only to submit a letter stating whether it would voluntarily address the contamination. Joslyn and the other respondents declined and exercised their right to request a hearing. On May 19, 1987, Joslyn gave notice of the potential "future claim" when it was unclear what the DEQ would do. They then gave notice again on June 23, 1987, when it expected the DEQ to enter an amended Compliance Order directing the work to begin. When the DEQ served Joslyn with the amended order on December 17, 1987, Joslyn promptly sent it to Liberty on December 31, 1987. Therefore, Joslyn contends that it was only this amended letter that triggered their duty to notify Liberty, of which Joslyn gave timely notice, and that the district court erred in finding that the notice was late. We disagree.

The August 2, 1986 Compliance Order stated that Joslyn was subject to liability for clean-up and remedial costs, and ordered it to submit an approved clean-up plan for the site. The August 2, 1986 Compliance order is substantially equivalent to the Amended Compliance Order dated December 17, 1987, of which Joslyn agrees is a claim. This court concludes that this order was, at least, a claim which triggers Joslyn's contractual obligation to

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2. The district court notes the incongruent position advanced in the early stages of the trial, where Joslyn admitted that the August 2, 1986 order was a claim when attempting to engage Liberty's duty to defend (as well as reimburse any expenses already incurred). *See* Memorandum Ruling p. 7 fn. 2. Joslyn has apparently restructured its argument to allege that the August 2, 1986 DEQ Order was not a claim or suit which would trigger the duty to defend, and asserts that no claim or suit occurred until the Amended Compliance Order of December 17, 1987, of which Liberty was immediately notified.

provide Liberty with immediate notice thereof as an express condition precedent to coverage. Joslyn waited nine months before providing Liberty with the requisite notice, thereby committing a material breach of a condition precedent to coverage under the policy. We next address the consequences of this late notice on the rights and liabilities of the parties to the contract.

Joslyn suggests that, even if they were late in providing Liberty with notice, Louisiana law interprets this clause to require "reasonable" notice to allow the insurer to adequately prepare a defense. Joslyn claims that they were reasonable in their conduct. Furthermore, Joslyn asserts that Liberty suffered no prejudice from any delay, and therefore should not be relieved from extending coverage to Joslyn. Appellant claims that Liberty had a full opportunity to participate in Joslyn's defense and to protect itself, but chose to do nothing and let Joslyn bear the costs of the defense.[3]

In holding that prejudice was not a factor to consider in policies where notice was a condition precedent to coverage, the district court relied on three relatively recent Fifth Circuit opinions: *Peavey Co. v. Zurich Insurance Co.*, 971 F.2d 1168 (5th Cir.1992); *Auster Oil & Gas, Inc. v. Stream*, 891 F.2d 570 (5th Cir.1990); and *MGIC Indemn. Corp. v. Central Bank of Monroe, La.*, 838 F.2d 1382 (5th Cir.1988). "The rule in Louisiana is that where the requirement of timely notice is not an express condition precedent, the insurer must demonstrate that it was sufficiently prejudiced by the insured's late notice" *Peavey*, 971

3. Moreover, Joslyn points out, Liberty never claimed prejudice in its reasons for claim denial, and should be barred under waiver principles from raising this defense on appeal. Liberty Mutual did not waive this defense, as it properly raised it in its answer.

F.2d at 1173. But where prompt notice of a covered occurrence is a "condition precedent" to recovery under an insurance policy, and the insured fails to give such notice, the claim is no longer covered by the policy, regardless of whether the insurer can demonstrate prejudice. *MGIC,* 838 F.2d at 1385-87. In the present case, timely notice was an express condition precedent to coverage. In *MGIC,* we held that the words "condition precedent" mean exactly what they say, and failure to comply with the provision precludes coverage. *Id.* at 1385.

Notably, this court's decision in *MGIC* neglected to discuss a Louisiana Supreme Court opinion disposing of a substantially similar issue. The Louisiana Supreme Court has rejected the view that a non-prejudicial delay in notice breaches a "condition precedent" on similar facts to those presented here. In *Jackson v. State Farm Mut. Auto. Ins. Co.,* 211 La. 19, 29 So.2d 177 (1946), the court reversed an intermediate appellate court decision which relieved an insurer of its obligations under a "condition precedent" analysis even though the insurer received notice soon enough to defend the claim. The Louisiana Supreme Court held that all the facts and circumstances must be considered in "balancing the equities" in late notice cases, including "what prejudice to the insurance company's defense has been caused by the delay . . . ." *Id.,* 29 So.2d at 179.

In requiring the parties to live by the express terms of the contract they freely entered, the *MGIC* court distinguished those cases which have required a showing of prejudice to balance the equities where the policy holders were consumers unlikely to be conversant with all the fine print of their policies. *MGIC,* 838 F.2d at 1387. This court then reasoned that "strict adherence to the terms of the notice provision would result too harshly against unsophisticated consumers and so have required the insurance

companies, in order to bar recovery under the policies, to demonstrate that prejudice had resulted from the lack of notice." *Id.* The equitable rationale does not apply so strongly where both parties are sophisticated businesses, which are expected to be conversant with the terms of their contracts. *Id.*

Our factual scenario requires us to distinguish *Jackson* and follow the precedent laid down in *MGIC*. Unlike the instant case, the insured in *Jackson* had reasonable grounds to believe that no claim would be made until the demand was made upon him. *Jackson*, 29 So.2d at 177, 179. Additionally, the insured was only eighty-two days tardy in providing the necessary notice, *id.* at 177, as opposed to Joslyn's nine month delay. And finally, the court in *Jackson* was painstakingly trying to protect the average citizen who purchases a public liability policy without becoming familiar with its detailed provisions, but simply puts it away against the day when a claim may be made against him. *Id.* at 178. Moreover, the claim in *Jackson* was brought by an injured third party against the insurance company. This court adopted the same prejudice inquiry for claims brought pursuant to the Louisiana Direct Action Statute. *See Auster,* 891 F.2d at 578 (holding non-prejudicial delay in notice could not bar recovery by third party claimant under statute). Such is not the case before us. Joslyn is not a third party claimant, but a sophisticated business entity. Consequently, these equitable exceptions do not weigh in their favor.

In *MGIC* this court held that the insurer is not compelled to prove prejudice where timely notice is a condition precedent to coverage for a sophisticated business entity:

> Much of the debate between [the parties] at both the trial and appellate level concerns

> whether this language negates MGIC's obligation to demonstrate prejudice resulting from lack of notice. We hold that the language stating that compliance with this provision is a condition precedent to recovery under the policy means exactly what it says, and that if Central failed to comply with this provision by not giving MGIC timely notice of the claim made, then the claim will not be covered under the policy, regardless of whether MGIC can demonstrate prejudice.

MGIC, 838 F.2d at 1386. It is well established under Louisiana law that:

> The courts may not make a contract for the parties. Their functions and duties consist simply in interpreting and enforcing the agreement as actually made. It is self-evident that a failure to restrict the rights of an injured person to the terms and conditions of the insurance contract would expose the insurer to liability far and beyond the scope of the contract.
>
> . . . To allow recovery in the absence of compliance of these provisions of the contract would be unreasonable and inequitable, and would establish a dangerous precedent, inviting obvious instances of abuse.

Id. (citing *Hallman v. Marquette Cas. Co.*, 149 So.2d 131, 135-36

(La.Ct.App.1963)). Under these facts, a nine month delay constitutes a material breach of the condition precedent of immediate notice. *MGIC* instructs us that prejudice need not enter the calculation.

Appellant asks us to limit *MGIC* to the facts of that case, where the notice came after trial had already concluded causing obvious prejudice to the insurance company. However, this court enunciated its broad holding in *MGIC* even after recognizing the opportunity to limit the decision to the narrow facts before it. ". . . *Hallman* is strong support for the proposition that MGIC was prejudiced as a matter of law when Central failed to notify it of the suit until after final judgment. We need not decide the case before us on that basis, however, since we hold that the express contractual provision requiring notice as a condition precedent should be given its full effect." *MGIC*, 838 F.2d at 1386 n. 2. We are bound by our precedent in *MGIC*.

Appellant alleges error committed in the lower court by holding that the DEQ Compliance Order was not a "suit" which Liberty was obligated to defend under its policies. Further, appellant claims that by excluding portions of the affidavit of Joslyn's former Risk Manager and in concluding that Joslyn failed to meet its burden in proving the terms and conditions of the missing liability policies covering Joslyn from 1952 to 1962, the district court committed reversible error. However, we need not reach these subsequent issues since Joslyn did not fully comply with the express terms of the conditions precedent in the contract.

Appendix A

CONCLUSION

In this case we find that a claim was made, at the latest, when Joslyn received the August 2, 1986 DEQ Compliance Order. Timely notice was then due Liberty. Thus, when Joslyn waited nine months to notify Liberty, it violated the condition precedent of timely notice, and therefore its untimely claim is not within the policy's coverage. We will not disregard the express language of the insurance contract, and ignore the condition precedent notice requirement to effectively rewrite the contract to expand coverage for Joslyn. The appellant's motion to certify this question to the Louisiana Supreme Court is DENIED, and the judgment of the district court is

AFFIRMED.

APPENDIX B — MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION DATED JULY 8, 1993

JOSLYN MANUFACTURING COMPANY

v.

LIBERTY MUTUAL INSURANCE COMPANY.

Civ. A. No. 90-2456.

United States District Court,
W.D. Louisiana,
Shreveport Division.

July 8, 1993

* * *

T. Haller Jackson, III, Tucker Jeter Jackson & Hickman, Shreveport, LA, Jay A. Canel, Stephen D. Davis, Canel Davis & King, Chicago, IL, for plaintiff.

Jack O. Brittain, Sr., Brittain & Sylvester, Natchitoches, LA, Martha J. Koster, Lee Glickenhaus, Mintz Levin Cohn Ferris Glovsky & Popeo, Boston, MA, for defendant.

MEMORANDUM RULING

STAGG, District Judge.

This is an action for a declaratory judgment and damages arising from a denial of insurance coverage. Joslyn Manufacturing Company ("Joslyn"), a Massachusetts corporation, filed this action against its insurer, Liberty Mutual

Insurance Company ("Liberty Mutual"), an Illinois corporation. Joslyn seeks, first, the determination whether Liberty Mutual must defend and indemnify Joslyn against the orders of the Louisiana Department of Environmental Quality ("DEQ") compelling remediation of contamination at the old Lincoln Creosoting site in Bossier City, Louisiana; second, Joslyn wants a determination whether Liberty Mutual must pay any costs incurred by Joslyn in connection with the toxic tort personal injury and property damage claims made by neighbors to the site in a suit entitled *Johnson v. Lincoln Creosote et al.*, which is pending in state court. This court has jurisdiction pursuant to 28 U.S.C. § 1332.

This case was tried to a jury from March 15 to March 18, 1993. The insurance policies at issue contain exclusions for damages which were "expected or intended" by the insured and for damage to the insured's own property. The jury found that Joslyn neither expected nor intended that contamination of the environment would result from its operations at the Bossier City site and that Joslyn incurred costs on account of damage to groundwater. Essentially, what remains to be decided is whether Joslyn is entitled to *any* insurance coverage from Liberty Mutual and, if so, the amount of coverage available.

A. THE FACTS

Lincoln Creosoting Company treated wood with creosote at the Bossier City, Louisiana, plant between 1935 and 1950. It also leased property from the Louisiana and Arkansas Railroad, in connection with its operation of the plant.

Joslyn purchased the Lincoln Creosoting Plant in Bossier City on July 24, 1950. It operated the plant until 1969. Lincoln assigned the railroad leases to Joslyn in connection with the plant

sale. Joslyn entered into leases for additional property from the railroad on January 15, 1955 and on October 12, 1967. Both sets of leases contained an indemnity clause. When Lincoln operated the plant, waste water from the creosote treatment operation flowed into a slough on the east end of the property. When Joslyn began operating the plant in 1950, Joslyn by-passed the slough and installed a 30,000-gallon settlement tank to recover creosote for re-use. Within six months, Joslyn also installed a second 10,000-gallon tank in series after the 30,000-gallon tank for the recovery of creosote. In the mid- to late-50s, Joslyn installed an unlined pond in series after the settling tanks to enable it to use pentachlorophenol ("penta") to treat poles. Penta was also recovered from the ponds for re-use. This recovery system was instituted for economic reasons, but it did not recover all creosote and penta from the waste water. In the 1960's, Joslyn began using a small amount of chromium arsenic copper ("CAC") to treat wood, which was used with a closed-system treatment method. Treatment chemicals were released into the environment in each year of Joslyn's operation. Joslyn sold the plant to Koppers, Inc. on December 1, 1969.

Joslyn has been a Liberty Mutual insured since 1945. From 1962 through 1969, the creosote plant was an insured location under Joslyn's policies with Liberty Mutual. Neither party can locate any of the pre-1962 liability policies between Joslyn and Liberty Mutual.

Between 1962 and 1966, Joslyn's general liability policies with Liberty Mutual contained a special Louisiana endorsement which provided coverage for property damage and personal injury caused by an occurrence. An occurrence was defined as "either an accident or a continuous or repeated exposure to conditions which result during the policy period in injury to

persons or real or tangible property which is accidentally caused. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence." In the 1967-69 policies, an occurrence was defined as "an accident, including injurious exposure to conditions which results during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint in the insured." None of the policies between 1962 and 1969 contained a pollution exclusion. All of the policies provided insurance coverage for Joslyn's contractual liability to indemnify a lessor for certain specific liability imposed by law on the lessor.

After the sale to Koppers in December 1969, the Bossier City plant was not listed on Joslyn's policy with Liberty Mutual as a location for which coverage was provided.

In 1985 the DEQ began studying the old Lincoln Creosoting Plant site. On October 14, 1985, a report was issued to the DEQ that found the soil contaminated at the site and an extremely high probability of groundwater contamination. On December 6, 1985, the DEQ sent Joslyn an information request concerning the site, and Joslyn responded on February 7, 1986. On August 2, 1986, the DEQ issued a compliance order finding that Joslyn and twelve other parties were subject to liability for clean-up and remedial costs, and ordered the parties to submit an approved clean-up plan for the site. This order was stayed because of requests for a hearing. On December 17, 1987, the DEQ ordered Joslyn and the other potentially responsible parties to investigate and clean up the site. Joslyn's investigation confirmed soil and groundwater contamination at the site.

Joslyn advised Liberty Mutual of the DEQ action on May 19, 1987, and on June 23, 1987. Liberty denied coverage by letter of March 30, 1989.

Appendix B

In March 1987, site neighbors filed a suit against Joslyn and others in the 26th Judicial District Court for Bossier Parish, Louisiana, entitled *Johnson v. Lincoln Creosote Company, Inc.* The complaint alleges that plaintiffs suffered personal injuries and property damage as the result of exposure to chemicals which emanated from the site. Joslyn tendered this suit to Liberty Mutual on or about April 10, 1987. Liberty Mutual tendered a defense to Joslyn for the *Johnson* suit as of February 26, 1992.

B THE INSURANCE POLICIES

1 PRE-1962 POLICIES

The parties agree that Joslyn has been insured by Liberty Mutual since 1945, but that the pre-1962 policies are lost. The parties stipulated that the 1955 and 1956 comprehensive general liability policies with Liberty Mutual provided $1 million in coverage for personal injury, and $1 million for property damage. The 1957-66 policies also provided comprehensive general liability coverage. The 1957-58 policies provided $1 million for personal injury and $1 million for property damage. The 1959 policy had a $3 million single aggregate limit, bodily injury and property damage combined. The 1960-69 policies had a $10 million single aggregate limit for bodily injury and property damage combined.

This is the only evidence concerning the pre-1962 policies which is properly before the court.[1] Joslyn has introduced no

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1. In relation to the pre-1962 policies, Joslyn has attempted to submit, post-trial, the affidavit of Philip Gehrke, its risk manager from 1947 through 1983. Liberty Mutual has filed a Motion to Strike the Affidavit. Liberty Mutual claims it has been deprived of any opportunity to cross-examine Mr. Gehrke on the statements made in his Affidavit. Liberty Mutual's Motion to Strike the Affidavit of

(Cont'd)

evidence of the terms and provisions of the pre-1962 policies. However, even if Joslyn had established the terms and provisions of the pre-1962 policies, coverage would be denied for the reasons stated in the following section.

2 COVERAGE: THE ISSUE OF LATE NOTICE

On August 2, 1986, the Department of Environmental Quality ("DEQ") issued a compliance order finding that Joslyn was subject to liability for clean-up and remedial costs, and ordered it to submit an approved clean-up plan for the site. Joslyn advised Liberty Mutual of the DEQ's actions on May 19, 1987

(Cont'd)

Philip Gehrke is GRANTED. Additionally, as evidence of the terms and provisions of the pre-1962 policies, Joslyn states in its post-trial Reply Brief that:

> Joslyn has represented it had "caused by accident" coverage for this plant from 1950 through 1956; a special Louisiana endorsement providing "occurrence coverage from 1957 through 1966; and "occurrence coverage from 1967 through 1969. Liberty has never challenged that representation. In fact, Liberty acknowledged this coverage in the Illinois case and represented that there was no practical difference in the scope of coverage provided, *i.e.*, all basically covered property damage that was neight expected nor intended by the insured.

(footnote omitted). Joslyn also cites exhibits from the "Illinois case" which were not introduced into evidence in the present case. In the absence of a stipulation or any evidence to support Joslyn's statements, these assertions in a post-trial brief are insufficient to establish the terms and provisions of the pre-1962 policies. Liberty Mutual has expressly challenged Joslyn's lack of evidence on this issue.

and June 23, 1987.[2] The August 2, 1986 DEQ compliance order was amended on December 17, 1987. Liberty Mutual denied coverage on March 30, 1989 based on a 1985 insurance policy. The insurance policies at issue provide, in part:

> NOTICE OF CLAIM OR SUIT. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

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2. The May 19, 1987 letter from Joslyn to Liberty Mutual states "[w]hile there is nothing for [Liberty Mutual] to do at this time, we are putting you on notice that this may result in a future claim under our prior General Liability Policy," and Joslyn enclosed the August 2, 1986 DEQ compliance order. The court notes that in the June 23, 1987 letter to Liberty Mutual, Joslyn states "[n]otice of a claim relative to this site has previously been forwarded to Liberty Mutual . . . [and] [t]he purpose of this letter is to inform you of subsequent events." The letter concludes with the following paragraph:

> Joslyn *reasserts* its claim for insurance coverage for the costs incurred in performing clean-up actions dictated by the Department of Environmental Quality as well as demanding that Liberty Mutual perform its duty to defend Joslyn in these administrative proceedings.

(emphasis added). In Joslyn's brief dated May 25, 1993, Joslyn now asserts that the August 2, 1986 DEQ order was not a claim or suit which would trigger Liberty Mutual's duty to defend. The issue of whether the August 2, 1986 DEQ order is a "suit" which would trigger Liberty Mutual's duty to defend will be addressed in a subsequent section. The court does conclude, however, that this order is, at minimum, a claim, which triggers Joslyn's contractual obligation to provide Liberty Mutual with immediate notice thereof as an express condition precedent to coverage.

Appendix B

And also that:

> No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial, or by written agreement of the insured, the claimant and the company.

See page LM01211 of the policy, found at Tab B of the appendix to Liberty Mutual's post-trial brief, titled "Requests for Rulings of Law".[3]

Joslyn delayed for over nine months before informing Liberty Mutual of the August 2, 1986 DEQ compliance order. Joslyn's notice to Liberty Mutual was clearly *not* immediate, as required by the insurance contracts.

"The rule in Louisiana is that where the requirement of timely notice is *not* an express condition precedent, the insurer must demonstrate that it was sufficiently prejudiced by the insured's late notice." *Peavey Co. v. Zurich Insurance Company,* 971 F.2d 1168, 1173 (5th Cir.1992) (emphasis added), *citing Auster Oil & Gas, Inc. v. Stream,* 891 F.2d 570 (5th Cir.1990); *MGIC Indem. Corp. v. Central Bank of Monroe, La.,* 838 F.2d

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3. This language is from a 1962 policy issued to Joslyn. Liberty Mutual has stated that the language used in the 1962 policy is similar to the language in the 1963-1969 policies, unless specifically noted. *See* Liberty Mutual's post-trial brief at p. 6, fn. 2. Joslyn has not contested this statement.

1382, 1387 (5th Cir.1988); *Barnes v. Lumbermen's Mutual Casualty, Co.*, 308 So.2d 326, 328 (La.App. 1st Cir.1975). In the present case, timely notice *was* an express condition precedent to coverage.[4] In a suit by the insured, where the terms of the insurance contract are breached by the giving of untimely notice, the insurer is not required to show prejudice in order to avoid liability to the insured. *See Jackson v. Transportation Leasing Company,* 893 F.2d 794, 795 (5th Cir.1990) *citing Auster Oil Gas, Inc., supra.*

Joslyn contends that it gave adequate notice to Liberty because Liberty has made no attempt to show that it was prejudiced in any way by delayed notice. Joslyn's only support for this claim is that this court should not follow the Fifth Circuit's decisions in *MGIC Indem. Corp., supra,* and *Jackson, supra,* since the Fifth Circuit "chose not to follow intermediate state appellate court decisions requiring prejudice." Although this court recognizes the harsh consequences of its decision, it is bound by the Fifth Circuit's interpretation of the intermediate state appellate court cases, which is, when notice is a condition precedent to coverage, an insurer is not required to show prejudice in order to avoid liability to the insured. Joslyn, without excuse, failed to give Liberty Mutual timely notice as required by the insurance policies as an express condition precedent to coverage. Liberty Mutual did not waive this defense, as it properly raised it in its answer.[5] In sum, Liberty Mutual owes no

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4. The aforementioned clauses contained in the Liberty Mutual policies are substantially similar to the clauses at issue in *Auster Oil & Gas, Inc., supra,* which were held to require timely notice as an express condition precedent to coverage.

5. Additionally, Liberty Mutual's denial of coverage on March 30, 1989 was based upon a 1985 policy which contained a "pollution exclusion," not found in the policies involved in the present suit.

insurance coverage to Joslyn for the claims asserted by the DEQ because Joslyn failed comply with the express terms of the policies.

3 LIBERTY MUTUAL'S DUTY TO DEFEND

A THE DEQ ORDERS

Joslyn alleges that Liberty Mutual has the "duty to defend and indemnify [Joslyn] against the orders of the [DEQ] compelling remediation of contamination at the [site]. . . ." *See* Pretrial Order at page 1.

The insurance contracts at issue only require Liberty Mutual to defend *suits* against its insured. Although the policies provide coverage for claims against the insured, the duty to defend only arises when a suit has been filed. This distinction becomes clear after reviewing the insuring agreement contained within the policies. This provision provides that Liberty Mutual has the right and duty to defend a suit against Joslyn, and that it *may* investigate and settle any *claim or suit* agaist Joslyn.[6]

Thus, the initial issue which must be addressed is whether

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6. The 1962 policy provides that Liberty Mutual: shall defend any *suit* against the insured alleging such injury, disease or destruction and seeking damages on account thereof, even if such *suit* is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any *claim or suit* as it dems expedient. . . .

(emphasis added).

the August 2, 1986 and/or the amended December 17, 1987 DEQ orders constitute "suits" under the terms of the policies which would thereby invoke Liberty Mutual's duty to defend.[7] The word "suit" is not defined in Liberty Mutual's policies. "Under Louisiana law, an insurance policy is a contract and the words used in a contract 'are to be understood in the common and usual signification, without attending so much to grammatical rules as the general popular use.' " *F.D.I.C. v. Mijalis,* 800 F.Supp. 397, 400 (W.D.La.1992) *citing Harmon v. Lumbermens Mutual Casualty Company,* 247 La. 263, 170 So.2d 646, 651 (1965).

> Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . . . *NLRB v. Federbush Co.,* 121 F.2d 954, 957 (CA2 1941) (L. Hand, J.)

King v. St. Vincent's Hosp., __ U.S. __, __, 112 S.Ct 570, 574, 116 L.Ed.2d 578 (1991) (footnote omitted). No Louisiana cases defining the word "suit" have been cited by the parties. The court's own research has found no Louisiana cases interpreting the word "suit" in the context of an insurance contract and the "duty to defend." Louisiana cases defining the word "suit" in other contexts have been unearthed. For example, in *Sims v. Sims,* 247 So.2d 602 (La.App. 3d Cir.1971), the Court examined the meaning of the word "suit" in the context of the Louisiana Code

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7. By Minute Entry dated May 25, 1993, this court requested that Joslyn identify which DEQ orders it was claiming that Liberty Mutual was required to defend. Joslyn identified the August 2, 1986 and December 17, 1987 DEQ orders and argues that the August 2, 1986 order is neither a claim nor a suit.

of Civil Procedure. The Court noted that the Louisiana Code of Civil Procedure did not contain a definition of the word "suit," and stated:

> The 1870 Code of Practice art. 96, defined a "suit" as a "demand, made before a competent judge." In this sense, a "suit" is the same as a "civil action" under LSA-C.C.P. art. 421. We conclude that the redactors of the Code of Civil Procedure intended the word "suits" in art. 531 to be synonymous with the words "civil action" in art. 421. Under this construction, it is clear that a suit is pending after it has been commenced by the filing of a pleading in a court of competent jurisdiction.

Id. at 604; *see also Stringfellow v. Nowlin Bros.*, 157 La. 683, 102 So. 869 (La.S.Ct.1925).

Cases from other jurisdictions are relevant because "[t]he law of insurance is the same in Louisiana as in other states." *See Calcasieu-Marine Nat. Bank v. American Employers' Ins. Co.*, 533 F.2d 290, 295 (5th Cir.), *cert. denied* 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976). In *Simon v. Maryland Cas. Co.*, 353 F.2d 608 (5th Cir. 1965), the question before the Court in Texas was:

> whether the defense coverage provisions and no action clause of a general liability policy are to be read so literally that an assured, who in an adversary proceeding has been adjudicated guilty of negligence by a constitutional court, is denied any coverage

> because the suit was by, not against him and no affirmative money judgment was rendered against him.

Id. at 610. In discussing the phrase "suit against the insured," the Court noted:

> A suit is against an assured when, in a *judicial* proceeding to which he is a party (or deemed by the law to be a party), a definable claim or contention is asserted that the assured has a legal liability for damage or injury to person or property.

Id. at 612 (emphasis added). In *Ray Industries, Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754 (6th Cir.1992), the Court extensively examined the issue of whether an EPA letter constituted a "suit" that would trigger a duty to defend. The Court noted that the general dictionary definition and the traditional meaning of the word "suit" refer only to those proceedings that take place in a court of law. The Court further noted that the insurance policies at issue specifically distinguished between a suit and a claim in several places. The Court concluded the Liberty Mutual's duty to defend was not triggered by the PRP letter from the EPA. For further discussions and varying analyses, concerning whether a PRP letter constitutes a suit for purposes of the duty to defend, *see also, Aetna Cas. and Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707, 713 (8th Cir.1992) (Under Missouri law, EPA demand letters requiring clean up of various sites do not constitute suits for damages which trigger duty to defend.); *Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir.1991) (Under Idaho law, EPA's administrative claims trigger the insurer's duty to defend.); *Ryan v. Royal Ins. Co. of America*, 916 F.2d 731 (1st

Cir.1990) (Under New York law, agencies' letters were not sufficiently coercive to constitute a suit, however, the word suit does not necessarily require a lawsuit to be filed before the duty to defend arises.); *Avondale Industries, Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 496 U.S. 906, 110 S. Ct. 2588, 110 L.Ed.2d 269 (1990) (Interpreting New York contract law, the Court concluded that a letter from the Louisiana Department of Environmental Quality constituted a suit, as it was a formal demand for immediate action to clean up a hazardous waste site.) and *Maryland Cas. Co. v. ARMCO, Inc.*, 822 F.2d 1348 (4th Cir.1987) (Under Maryland law, EPA claim seeking compliance with regulatory directives, including reimbursement of response costs does not constitute a claim for "damages" and does not invoke the duty to defend.).

The DEQ orders at issue are entitled "In the Matter of: Lincoln Creosoting Facilities, Bossier City, Louisiana Proceedings Under the Louisiana Environmental Quality Act, La.Rev.Stat. 30:1051 *et seq.* Compliance Order." The orders state that they are issued by the Secretary of the Department of Environmental Quality of the State of Louisiana under the authority granted in the LEQA and the orders notify respondents (not "defendants") that failure to reply to the orders would subject respondents "to *possible* enforcement proceedings under Section 1973 of the Act [LEQA] which could result in the assessment of civil penalties in an amount not to exceed $50,000 for each day of continued non-compliance." (emphasis added). La.Rev.Stat. 30:1073 has been re-designated as 30:2025 and sets forth the permissible enforcement proceedings under the LEQA. La.Rev.Stat. 30:2025 specifically grants the DEQ the authority to file a civil action, *i.e.*, the LEQA itself differentiates a compliance order from a civil action and considers a compliance order something less than a civil action.

Appendix B

This court concludes that the August 2 and the amended December 17 compliance orders issued by the DEQ do not rise to the level of a suit which would invoke Liberty Mutual's duty to defend. The court bases this conclusion on several factors: (1) the compliance order itself specifically provides that if respondent refuses to comply with the order, the respondent could be subject to possible enforcement procedures under § 1073 [now: § 2025] of the LEQA, *i.e.*, a civil action or civil penalties; (2) the general and traditional definition of a suit refers to a formal proceeding in a court of law; and most importantly, (3) the insurance policies specifically differentiate between the words claim and suit for purposes of the duty to defend. An insurance policy is a contract, and this court finds that Liberty Mutual only contracted to defend Joslyn against suits, not against compliance orders of this nature.

B THE JOHNSON TOXIC TORT SUIT

On February 26, 1992, Liberty Mutual agreed to defend Joslyn in the *Johnson* suit. At trial, Joslyn's in-house attorney, Carl Grabinski, testified that Liberty Mutual had still not reimbursed Joslyn's defense costs in that case. After the jury trial in this matter, the parties were ordered to submit a list of issues which remained to be decided by the court. A briefing schedule was then established. The issue of Liberty Mutual's duty to defend the *Johnson* suit was not identified as an issue which remained to be decided.

By a minute entry dated April 26, 1993, the parties were asked to inform the court whether the issue of payment of defense costs in the *Johnson* suit remained to be decided. In a letter to this court dated May 6, 1993, Liberty Mutual states that it agreed to defend Joslyn in the *Johnson* suit and that Joslyn acknowledges that Liberty Mutual has honored its obligation. Thus, the court

considers this issue MOOT and attaches Liberty Mutual's letter as evidence thereof. *See* attached Appendix "A."

IT IS ORDERED that defendant shall submit a judgment consistent with the terms of this memorandum ruling within ten (10) days of its filing.

THUS DONE AND SIGNED.

APPENDIX A

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Lee H. Glickenhaus

May 6, 1993

Honorable Judge Tom Stagg
Federal District Court
Western District of Louisiana
500 Fannin Street
Room 106
Shreveport, LA 71101

Re: Joslyn Manufacturing v. Liberty Mutual Insurance

Company Number CV90-2456

Appendix B

Dear Judge Stagg:

This letter is Liberty Mutual's brief response to Joslyn's brief pursuant to the minute order of April 26, 1993 concerning Joslyn's claim for coverage with regard to the *Johnson* Complaint. Liberty Mutual has agreed to defend to Joslyn from the *Johnson* case. Joslyn acknowledges in its papers that Liberty Mutual has honored this obligation. There is no suggestion that Liberty Mutual will refuse to honor this obligation in the future. Accordingly, this issue is moot and there is no need for the Court to issue a ruling on this matter at all.

Respectfully submitted

/s/ *Lee H. Glickenhaus*
Lee H. Glickenhaus

cc: Steve Davis, Esq.
Jack O. Brittain, Esq.
T. Haller Jackson, III, Esq.
Martha Koster, Esq.

LHG/bw: 278228.1

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 30, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5563

JOSLYN MANUFACTURING CO.,

Plaintiff-Appellant,

versus

LIBERTY MUTUAL INSURANCE CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

ON SUGGESTION FOR HEARING EN BANC

(September 30, 1994)

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on hearing en banc, (FRAP and Local Rule 35) the Suggestion for Hearing En Banc is DENIED.

* * *

Appendix C

ENTERED FOR THE COURT:

s/ Reynaldo G. Garza
United States Circuit Judge

[stamped]
CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.